



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 31, 1996

Mr. Leonard W. Peck, Jr.
Assistant General Counsel
Legal Affairs Division
Texas Department of Criminal Justice
P.O. Box 99
Huntsville, Texas 77342-0099

OR96-0134

Dear Mr. Peck:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 36267.

The Texas Department of Criminal Justice (the "department") has received a request for information relating to complaints filed by an employee of the department. You have submitted to our office for review "exemplar documents" that you believe are responsive to the request.¹ You assert that this information is excepted from required public disclosure by sections 552.101, 552.103, 552.107, 552.108, and 552.111 of the Government Code.

¹To the extent that the "exemplar documents" submitted to this office are representative samples of the documents requested, we assume that these representative samples are truly representative of the requested records as a whole. See Government Code § 552.301(b)(3) (governmental body may submit representative samples of information if voluminous amount of information was requested); see also Open Records Decision Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state that the requestor has filed a lawsuit against the department and have submitted a copy of the Plaintiff's Original Petition for our information. Thus, you have met the first prong by showing that litigation is pending. The lawsuit alleges, among other things, sexual harassment and a hostile working environment. Many of the documents that are being requested and that you have submitted concern complaints of alleged sexual harassment by the plaintiff in the lawsuit. One Internal Affairs Division report that you have submitted does not appear to directly concern sexual harassment but does involve the plaintiff of the lawsuit. You state that this report is "connected to the weave of relationships and parties that are the subject of the litigation" and indicate that you believe that these issues will soon arise in the lawsuit. We believe that the information on its face, together with the explanation that you have provided, is sufficient to show that the information is related to the anticipated litigation. Therefore, you may withhold this information under section 552.103 of the Government Code.

Our review of the submitted records indicates that some of the information at issue has already been seen by the plaintiff in the pending litigation. Generally, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has previously been viewed by the plaintiff is not excepted from disclosure under section 552.103(a). We also note that the applicability of this section ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982) at 3.

Because we have held that the department may not withhold under section 552.103 those documents that have previously been disclosed to the plaintiff, we must address your other claimed exceptions.² We conclude that section 552.107 does not

²Although you asserted in your original request for an opinion dated October 5, 1995, that the information being requested is excepted from disclosure by sections 552.108 and 552.111 of the Government Code, in your subsequent correspondence to this office in which you briefed your arguments for non-disclosure, you did not raise these exceptions or provide us with any information to explain how these exceptions might apply, nor did you mark the portions of the submitted documents that you felt

except from disclosure those documents previously disclosed to the plaintiff. Open Records Decision Nos. 574 (1990) (Gov't Code § 552.107 does not apply to communications that are not confidential). We believe that section 552.101, however, may make confidential some of the information that has previously been disclosed to the plaintiff.

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and it is of no legitimate concern to the public. *Id.* at 683-85.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

To the extent the documents that have previously been disclosed to the plaintiff contain the identities of witnesses or victims in sexual harassment matters, the identities of the witnesses and victims are excepted under *Ellen*, common-law privacy, and section 552.101. Open Records Decision No. 400 (1983) at 2 (information that is confidential by law may not be released even if previously disclosed). However, you may not withhold information under section 552.101 on the basis of protecting a requester's own common-law privacy interests. Open Records Decision No. 481 (1987) at 4. Thus, of the information that has previously been disclosed to the plaintiff, you may withhold information that would identify victims and witnesses of sexual harassment, but may not withhold information, if any, that would identify the requestor.

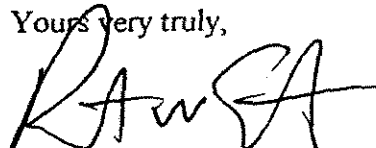
(Footnote continued)

might be excepted under these provisions. Because you have not shown that sections 552.108 or 552.111 apply to the information you wish to withhold, and because these are discretionary exceptions, we find that you may not withhold any of the requested information under these exceptions. See Gov't Code §§ 552.007, 552.301.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records.

If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read 'RWSA', written over the typed name.

Robert W. Schmidt
Assistant Attorney General
Open Records Division

RWS/MAR/ch

Ref.: ID# 36267

Enclosures: Submitted documents